UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

HANCOCK LUMBER, LLC.

and Cases 3–CA–25058–1

3-CA-25187-1

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, EMPIRE STATE REGIONAL COUNCIL OF CARPENTERS, LOCAL 42

3-CA-25260-1

Robert Ringler, Esq., for the General Counsel. Robert W. Sikkel, Esq., of Grand Rapids, MI, for the Respondent. Anthony Lumia, Esq., of Melville, NY, for the Charging Party.

Decision

Statement of the Case

David L. Evans, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Binghamton, New York, on August 1–3, 2005. Beginning on September 17, 2004, and continuing through February 9, 2005, United Brotherhood of Carpenters and Joiners of America, Empire State Regional Council of Carpenters, Local 42 (the Union), filed the charges in Cases 3–CA–25058-1, 25187-1 and 25260-1 alleging that Hancock Lumber, LLC (the Respondent), had committed various violations of the Act. On May 18, 2005, after administrative investigation of the charges, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent, by its supervisors and agents, has violated Section 8(a)(1) of the Act¹ by threatening its employees in order to discourage their activities on behalf of the Union, by soliciting and encouraging its employees to repudiate the Union, and by conducting surveillance of its employees' union activities. The complaint further alleges that the Respondent has violated Section 8(a)(3) of the Act² by discharging employees Richard Mayo and James DeGroat because of their union activities. And the complaint alleges that the Respondent has violated Section 8(a)(5) of the Act³ by refusing to bargain with the Union even though the Union had been designated or selected as the statutory collective-bargaining representative of the Respondent's production and maintenance employees. The Respondent duly filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,⁴ and after consideration of the briefs that have been filed, I enter the following findings of fact and conclusions of law.

¹ Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

² Section 8(a)(3) provides that it is unlawful for an employer "by discrimination ... to encourage or discourage membership in any labor organization."

³ Section 8(a)(5) provides that: "It shall be an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of his employees"

Jurisdiction and labor organizations' status

As it admits, the Respondent is a limited liability company that has an office and place of business in Hancock, New York, where it is engaged in the operation of a sawmill. Annually, in the course and conduct of that business operation, the Respondent sells, ships and delivers goods valued in excess of \$50,000 directly to purchasers that are located outside New York State. I therefore find and conclude that, at all material times, the Respondent has been

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an employer that is engaged in commerce

within the meaning of Section 2(2), (6) and (7) of the Act. As the parties stipulated at trial, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Background

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On March 14, 2002, the Board conducted an election among the approximately 47 production and maintenance employees of Mallery Lumber, a Division of Blue Triangle Hardwoods, Inc., which company then owned and operated the Hancock, New York, sawmill that is involved in this case. The purpose of the Board election was to determine if those employees desired to select the Union as their collective-bargaining representative under Section 9 of the Act. The ballots of several employees were challenged, and the Board's regional office conduced a hearing on those challenges. In late August 2002, while the representation matter was pending review before the Board, Mallery ceased production. On April 15, 2003, Theodore Rossi, the Respondent's sole shareholder, signed a lease for the mill with the George Mee Family Trust, which trust by then owned the mill. Production, however, did not immediately resume upon Rossi's leasing of the mill. On May 13, 2003, the Board issued a certification of the Union as the collective-bargaining representative of the Mallery employees. At some point in November 2003, Rossi ceased leasing the sawmill and purchased it. The mill's first production of lumber after Rossi's purchase occurred on November 24, 2003.

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Shortly after the Board issued the 2003 certification, representatives of the Respondent and the Union began a series of meetings to discuss the hiring of the former Mallery employees and the status of the Union as the representative (actual or potential) of those employees. Andrew Becker is the Respondent's in-house counsel, and he represented the Respondent in the discussions with the Union. During his testimony, Becker freely acknowledged that "[t]he company was willing to rehire those [the former Mallery] employees but didn't want to have any union involved in that facility." During the 2003 meetings, Howard Jones, president of the Union (who had retired at time of trial), took the position that the Respondent had an obligation to bargain with the Union because the Respondent was, under the Act, a legal successor to Mallery, or that the Respondent would be a successor if it hired former Mallery employees. Becker took the position that the Respondent would not be a successor of Mallery, even if it hired Mallery employees. On August 7, 2003, Rossi and Jones signed an agreement that provided:

In consideration of the mutual covenants hereinafter contained, the parties hereto agree as follows:

I. Union:

A. Agrees that it will not claim that both Hancock Lumber, L.L.C.[,] and any other company operating a portion of the Hancock, New York facility[,] are "successors" (under the NLRA) to Mallery Lumber, a Division of Blue Triangle Hardwoods, Incorporated, during the grace period set forth in paragraph [II] D. 1. below, and will only have the right to make that claim thereafter[] in the event that Hancock or such other company default[s] under the terms of this Agreement.

B. Agrees that it will not file a petition with the National Labor Relations Board seeking a representation election during the grace period set forth in paragraph [II] D. 1. below.

II. Hancock Lumber, L.L.C.[,] and Any Other Operating Partner at the Property:

A. Agree to offer employment, for vacant positions for which hiring is being conducted at the facility, to individuals who: (i) were former employees of Mallery Lumber, Division of Hardwood Lumber Manufacturing, Inc.; (ii) were members of the certified bargaining unit before their termination; (iii) were terminated for reasons associated with the closure of the facility and not terminated for disciplinary reasons; and (iv) are qualified for the position[s].

B. Agree to offer employment at the same wages and benefits programs at the time of each employee's termination.

C. Will prepare and disseminate an employee manual describing employment policies in effect at the facility.

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- D. Agree to voluntarily recognize the United Brotherhood of Carpenters and Joiners of America, Empire State Regional Counsel of Carpenters, Local Union 42[,] at the facility on the following terms and conditions:
- 1. Only after the expiration of a period of eight (8) months following the date on which the first daily regular production runs take place at the sawmill.
- 2. Upon presentation of signed and dated authorization cards of at least 66-2/3% of the employees in an appropriate bargaining unit at the facility, the Company will consent to a card check recognition. The card check recognition must be certified by a mutually selected neutral third party. The cards must be dated no later [sic] than 30 days prior to the date on which notice is given by the union to the employer that voluntary recognition is sought, and only those individuals who would be eligible shall have their cards counted.⁵
- 3. The Obligation of the Company to voluntarily recognize the union will terminate eight (8) months after the expiration of the grace period described in Paragraph 1 above.

(The parties referred to this contract as "the Recognition Agreement." As does the agreement itself, the witnesses referred to the period specified in section II(D)(1) as "the grace period." The meaning of section II(D)(1) is a pivotal issue in this case.)

During the negotiation of the Recognition Agreement, the Respondent's initial proposal, one dated July 25, 2003, included "a grace period extending to the completion of the resumption of full employment and full operations at the Hancock facility, including the yard, the kilns and the sawmill, but in no event shall the grace period exceed 12 months." On August 7, the Respondent submitted 2 other proposals for a grace period. First, the Respondent proposed a grace period "commencing on the date on which the first regular production runs are completed at the sawmill and extending to the completion of the resumption of full employment and full operations at the Hancock facility ... but in no event shall the grace period exceed 8 months." Then later on August 7, the Respondent proposed a grace period "of eight months following the date on which the first daily regular production runs take place at the sawmill," with no outside limit on when recognition upon a card check might be granted. As quoted above, the final agreement was that the grace period would begin on the date of "the first daily regular production runs" were to take place, and that the obligation to bargain with the Union after a (mutually verified) card check would end 8 months thereafter. Just when the "first daily regular production runs" were conducted is sharply disputed by the parties.

Frank Marziliano is a Council representative of the Union. Marziliano testified that in late June or early July 2003, he and Jones began meeting with Becker in an attempt to negotiate the Recognition Agreement. Marziliano testified that the Employer wanted a grace period during which the Union would not file a petition with the Board in order to have time to get the mill up and running. The Union agreed to that, Marziliano testified, in order to get the employees back to work as soon as possible. Jones testified that, during the negotiation of the Recognition Agreement, the parties agreed that, by their use of the phrase "first daily regular production runs," they intended that the grace period would begin to run when the Respondent performed its "first regular order of cuts," not counting "new machinery, sizing, testing machinery, [and] proto-typing." Marziliano testified consistently with Jones on that point.

For the Respondent, Becker testified that the Respondent did not believe that it was a lawful successor to Mallery but that it would nevertheless voluntarily agree to bargain with the Union if it achieved a (mutually verified) two-thirds card majority after the expiration of a grace period in which the Respondent could get the mill up and running. Becker testified that in proposing the grace period that is contained in section II(D)(1) of the Recognition Agreement:

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⁵ Although the agreement literally indicates that the cards must be signed "no later" than 30 days before a recognitional demand, the parties are in agreement that they meant "no earlier" than 30 days before such demand (the object being to eliminate from consideration any stale authorizations).

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... it was our intention to measure these regular production runs by former production at the mill, production as it used to work at that mill, when it was up and running with an adequate log supply, with an adequate complement of employees, and in a reasonable mechanical condition.

5 The "former production" to which Becker referred, of course, was that of Mallery.

Although a sawmill's production may readily be measured in board feet,⁶ Becker testified that the parties did not consider a board-feet standard to express the grace period of the Recognition Agreement because:

Howard [Jones] wouldn't agree to, and I wouldn't suggest, that we plug in a number when we reached [for example] 50,000 board feet a month, [or] 150,000 a month, because it's a process that was an evolving process. I assumed that we would be in contact regarding this, that we would be discussing the production runs.

It is not disputed that there were no such subsequent discussions between the Respondent and the Union about when the "first daily regular production runs" actually occurred before the Union submitted a demand for recognition on August 16, 2004, as described infra.

On August 14, 2003, or one week after the Recognition Agreement was signed, Rossi sent all former Mallery employees a letter stating that the Respondent and the Union were then finalizing an agreement "which would permit the sawmill at the Hancock facility to reopen." Rossi further stated that the Respondent then anticipated "over the next 30-45 days" to be offering employment to former Mallery employees, on the same terms, "before we extend offers to the employees from the outside."

⁶ A board foot is the volume of wood that is contained in a one-inch-thick board that is one foot square.

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Although the Respondent's first day of any production occurred on November 24, 2003, Monday, December 8, 2003, was the first day of the first full 5-day week that the Respondent produced lumber for sale, and, as discussed infra, I find that that date was the date that the "first daily regular production runs," within the meaning of the Recognition Agreement, took place. The Respondent had hired, I further find, 14 production and maintenance employees by December 8, 2003. No separate exhibit reflects this number, but I have deduced it from trial testimony and 2 summaries that the Respondent submitted during the Regional Office's investigation of the charges, and which summaries the General Counsel introduced into evidence. G.C. Exh. 4 is a listing of employees who were terminated from "8/1/03 - 8/1/04." The exhibit also lists hire dates of those who were discharged between August 1, 2003, and August 1, 2004; and, as well, the exhibit lists 13 employees who were hired between October 27, 2003, and July 12, 2004, and who were not discharged by December 8, 2003. G.C. Exh. 5 is a list of all individuals who were employed as of August 16, 2004, the date that the Union made a demand for recognition. On G.C. Exh. 4, 8 employees are listed as having been hired between October 27, 2003, and December 8, 2003; these employees are Stephen Caparelli, Mario Darder, Nicolas Picozzi, William Vernold, Richard Whitmore, Carl Hendrickson, Jason Ives and Neo Silva. G.C. Exh. 5 lists 5 employees who were employed on August 18 but who are not listed on G.C. Exh. 4; these 5 employees are: Christopher Johnson, David Lester, Daniel Robbins, Thomas Roberts, and Timothy Wormuth. Since these 5 employees were indisputably employed on August 18, they must have been hired before October 27, 2003, and continued to be employed thereafter. I add to these groups of 8 and 5 alleged discriminatee Richard Mayo who testified, without contradiction, that he was hired by the Respondent on October 3, 2003, but who is not listed on G.C. Exh. 4 as being among the employees who had not been discharged by August 1, 2004. (Mayo was discharged on August 12, 2004, as described infra.) According to the undisputed testimony of the General Counsel's witness William Vernold, all 14 of these production and maintenance employees who were employed by the Respondent on December 8, 2003, had been employed by Mallery and they kept the same, or essentially the same, jobs with the Respondent that they had held with Mallery.

The Union's demand for recognition

Marziliano further testified that at some point in 2004 the employees told him that the Respondent had cut its first order of lumber shortly before Thanksgiving of 2003. Interpreting this reported first cut as the "first daily regular production runs" within the meaning of the Recognition Agreement, the Union began collecting authorization cards from the employees in late July or early August 2004. By letter to Becker dated August 16, 2004, ¹⁰ Marziliano ¹¹ stated that the Union represented a majority of the Respondent's employees at Hancock, that the Union was seeking immediate recognition and bargaining for a collective-bargaining agreement, and that:

In the event you have any doubt as to whether our Union represents a majority of your employees, we are in the process of finding an independent third party (i.e.: a local clergyman) to check our authorization cards signed by your employees against your personnel records. Please forward a list of eligible production people only; excluding supervisors Kenny Esolen and Eric Ryder.

⁸ G.C. Exh. 4 also lists one office employee (Homer Wood) and 2 supervisors (James DiPerri and Kenneth Esolen) whom I have not considered in this portion of the analysis of the exhibits.

Jones had effectively retired by that point in time, apparently.

⁷ This finding is in accord with that made in a September 9, 2005, decision by Hon. David N. Hurd, Judge, the United States District Court for the Northern District of New York, in a collateral Section 10(j) proceeding.

⁹ Of course, I do not add alleged discriminatee James DeGroat who is included on G.C. Exh. 5 but whom the General Counsel acknowledges was a nonunit guard.

¹⁰ All dates subsequently mentioned are in 2004, unless otherwise indicated.

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According G.C. Exh. 5, the Respondent employed 28 individuals on August 16. Five of those individuals, however, were either admitted supervisors or office workers. The unit on the day of demand, therefore, consisted of 23 production and maintenance employees.

By letter to Marziliano dated August 19, Becker declined to meet for purposes of bargaining for a contract. Becker stated that, in the Recognition Agreement, in consideration for the Respondent's agreeing to hire former Mallery employees at their former terms and conditions of employment, the Union had agreed

... to a cessation of union activities at the facility until eight (8) months after the first daily, regular production runs were again achieved at the mill. In other words, after the work force was rehired and the mill was producing as it formerly did. ...

Your letter is premature since the facility has not been able, thus far, to achieve production runs at former levels.

Becker closed his letter by stating that the Respondent was having some concerns about the viability of the mill and that Becker wished to discuss those concerns with the Union.

By letter dated August 23, Marziliano informed Becker that

[I]t is the Union's intention to carry through with the scheduled card check (8/24/04) at 11:00 a.m., in Binghamton, NY, with Father Kevin Bunger present. 13 ...

In the event you choose not to honor tomorrow's card check off [sic] meeting, the Union will have no choice but to file charges with the NLRB.

(Marziliano's letter did not indicate where in Binghamton the card check might take place.) Marziliano acknowledged in his trial testimony that his August 23 letter was the first notice that the Respondent would have received that the Union was scheduling a card check on August 24.

By letter to Marziliano also dated August 23, Becker stated that the Union's demand for recognition was "premature" because "the eight (8) months' 'grace' period has not expired," that, even if the grace period had expired, the Recognition Agreement requires a "mutually selected neutral third party" to conduct the card check but the Union had chosen Father Bunger without any consultation with the Respondent, and that the Respondent was therefore declining to meet with the Union for purposes of bargaining for a contract. Becker further asked to meet with Marziliano to discuss "this situation."

On September 3, Marziliano met with Becker and the Respondent's owner Rossi. Becker and Rossi showed Marziliano some summaries that indicated that the mill had not achieved anywhere near Mallery's monthly production levels and argued that it was not "producing on a daily, regular basis" as required by the Recognition Agreement to start the grace period. Because of what they claimed the figures showed, and because of professed problems in establishing a reliable supply of logs, Becker and Rossi asked Marziliano to stop the organizational effort altogether. Marziliano refused. Becker testified, however, that:

At the September 3rd meeting and prior, during the various discussions with Mr. Jones and Mr. Marziliano, both of them said, "Look, if there ever comes a time when we are convinced that the Union, that the employees of this facility don't want the Union there, we'll back off and withdraw the attempt to organize this facility."

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¹² These were James DiPerri, Kenneth Esolen, Eric Ryder, Vicky Shakelton and Homer Wood. In the representation case, Rodney Geer, another individual who is listed on the exhibit, was described as a supervisor for Mallery. Geer, however, was not shown herein ever to have been a supervisor for the Respondent. I therefore count Geer as a unit employee. ¹³ Parentheses original.

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Rossi also testified that Marziliano made such a statement at the September 3 meeting. Neither Jones nor Marziliano was called in rebuttal to deny this testimony by Becker and Rossi.

By letter dated September 10, Becker informed Marziliano that: "Your solicitation of [authorization] cards, their [attempted] presentation to us, and attempts to verify them are a clear anticipatory breach of the Agreement." Becker further asserted that the Union's efforts at organization had created tensions among the employees "and have contributed to the failure of the facility to regain prior production levels." Becker added that the Union's organizational efforts were also making it impossible to secure necessary investors for the mill. Becker also asserted that the Union had an "uncaring attitude towards the employees." Becker concluded that, therefore, "we've decide we're going to proceed directly with them in terms of [personnel] organization at the facility."

In January 2005, Marziliano and Becker exchanged letters (two each) claiming that the other had breached the Recognition Agreement. Marziliano continued to demand recognition and contract-bargaining, and Becker continued to refuse. Becker's letter of January 14 is introduced with:

I have your letter of January 6, 2005. Let me tell you short and sweet the way I feel. You are so full of shit it is coming out of your ears.

The text of Becker's final letter consisted only of:

The employees of the Hancock Mill have made it perfectly clear that they do not wish you to represent them. That being the case, we decline to schedule a negotiation session and will continue to devote our time and energy to the men in the Hancock Mill.

Becker acknowledged that these letters were distributed to the employees.¹⁴ No subsequent communication between the parties has occurred.

Marziliano further identified a copy of a petition that he received in January 2005 from employee Timothy A. Wormuth. The heading of the petition is: "We the undersigned do not wish to be represented by the Carpenter's Union that is presently actively seeking to be involved in this facility (Hancock Lumber, Ltd.). It is our desire to allow the management of this company to operate free from union pressure and to allow them to build this company back to its full capacity." The petition is signed by Wormuth and 18 other employees. The signatures are dated October 4, 5 and 6.

The General Counsel offered 17 authorization cards as having been signed by members of the 23-employee bargaining unit within 30 days before the August 16 demand for recognition. Therefore, if any 2 of these cards are not valid, the Union did not attain a two-thirds majority of the 23-employee unit as required by the Recognition Agreement ([17 (less) 2]/23 = 65.21%). Of course, if only one of the 17 cards is invalid, the Union did achieve a two-thirds majority ([17 (less) 1]/23 = 69.56%). And, of course, the Union clearly did attain a simple card majority unless 6 of the 17 authorization cards are held to be invalid ([17 (less) 6]/23 = 47.82%).)

The Respondent challenges 3 of the proffered 17 unit-employee authorization cards as not having been signed within 30 days of the Recognition Agreement; those are the cards of Danny Bolster, Daniel Johnson and Joe Ryder. Vernold testified that he solicited, and witnessed the signatures on, these 3 cards within the 30-day period. The Respondent challenges the cards of Bolster and Johnson on the ground that the dates are in different colors of ink from the remainder of the cards. Vernold,

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¹⁴ Employee Vernold testified that the letters were received along with paychecks.

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The General Counsel offered an 18th card, that of alleged discriminatee James DeGroat. On brief, however, the General Counsel acknowledges that DeGroat, as a guard, was not a member of the bargaining unit where he states, at p. 4, that the Respondent "unlawfully terminated one unit and one non-unit employee." Only Richard Mayo (indisputably a unit employee) and DeGroat are alleged discriminatees; therefore, the General Counsel must have been referring to DeGroat.

however, credibly explained that he noticed that Johnson had not dated his card immediately after Johnson signed it and that he brought that fact to Johnson's attention at the time. Different pens were scattered on a table at which the employees were gathered to sign the cards, and Johnson took a different pen to date the card. Vernold also credibly explained that he did not ask Bolster until the next day after Bolster had signed his card to date it; Bolster dated the card, with a different pen, at that time. The card of Ryder, however, presents a different problem. The original of Ryder's card, which was examined at trial but not offered in evidence, shows that a date of "6/28/04" was obliterated, and below the obliteration has been placed "8-6-04." On cross-examination, Vernold testified that he witnessed Ryder, on August 6, mistakenly place "6/28/04" on the authorization card and then writing in, also on that date, "8-6-04." This is too much to believe, and I do not. That is, I do not believe that, in August, Ryder placed a date in June, and a specific date in June, on the authorization card. I believe, and find, that Ryder signed the authorization card on June 28. Ryder may also have simply re-dated the card on August 6 (and the Board would then have the question whether the re-dating constituted being "dated" within the Recognition Agreement), but that is not what Vernold testified to. Vernold testified that Ryder filled out the card, as well as re-dated it, on August 6. And that testimony by Vernold was not credible. Therefore, I find that the Union held 16 valid authorization cards in a unit of 23 employees on August 16, the date of the demand.

Attorney Becker testified that he believed that the Union breached the Recognition Agreement because "on August 16, 2004, I was presented with a letter from Frank Marziliano requesting that the Union be voluntarily recognized under this agreement." The Respondent does not make this argument on brief. The Respondent on brief does argue, however, that the Union "defaulted under Section II(D)(2) of the Agreement because it ignored the requirement that the third party that would certify the card check recognition must be 'mutually selected.'"

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As reflected by the summaries that Becker showed Marziliano on September 3, during the 11 months before it ceased operations in September 2002, Mallery produced 707,192 board feet per month (with a high of 849,050 in April and a low of 328,697 in June.) Assuming 20 work-days in a month, Mallery's daily production therefore averaged 35,359 board feet per day (with a high of 42,252 and a low of 16,435). Further according to the summaries, the Respondent's first production from the Hancock mill was on November 24, 2003, when it produced 7,058 board feet of lumber. On November 25 and 26, the mill produced 9,439 and 12,328 board feet, respectively. Thanksgiving 2003 was on the 27th; the Respondent did not operate on the 28th. The Respondent also did not operate the mill during the work-week of December 1-5, but it did operate each day during the week of December 8-12, averaging 18,301 board feet per day. The Respondent had no more 5-day weeks of production in 2003 after the week of December 8, but in 2004, through July (which is the last month the production of which is reflected by the September 3 summary), it had seven 5-day weeks that achieved production similar to that of December 8-12, 2003; these were the weeks starting January 26, February 9, February 16, February 23, March 1, March 8 and March 22. During the 9 months from November 2003 through July 2004, the mill operated for several 4-day weeks. Further, during that period, the mill operated the following numbers of days in each month: 3 in November and 11 in December 2003; and 10 in January, 19 in February, 22 in March, 19 in April, 15 in May, 20 in June, and 12 in July 2004.

Becker testified that at the September 3 meeting he and Rossi pointed out to Marziliano that, "the chart [the summaries which I have just summarized] illustrates two things. It isn't reaching former production levels and it isn't producing on a daily regular basis. The mill is running intermittently, sporadically." Becker further testified that, in his opinion, the "first daily regular production runs" under the Recognition Agreement did not occur until April 2005 when the Respondent began "running regularly on a daily basis, 5 days a week." On brief, the Respondent argues that Becker's testimony is consistent with the Recognition Agreement, but that, in any event, the "first daily regular production runs" did not begin until the 3 five-day production weeks of February 2004, and certainly not before the five-day week of January 26, 2004. From that, the Respondent argues that the Union's August 16, 2004, demand for recognition was, indeed, premature under the Recognition Agreement

because it occurred less than 8 months after January 26, 2004 (and occurred within even a lesser period from February 2004).

Discharges of Mayo and DeGroat

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Richard Mayo, first a lumber-stacker for Mallery and then for the Respondent, testified on direct examination that on August 11 he worked at the mill until 3:00 p.m. He then went, by bicycle, to his second job where he worked until shortly before 7:00 p.m. On his way home, he passed by a point from which he could observe Marziliano's automobile parked outside the mill's office, "so I went over there to see what he was up to." Mayo pedaled to the area of the Respondent's property where Marziliano had parked his automobile; from that area he saw Marziliano walking toward the mill. On foot, Mayo caught up to Marziliano, and Marziliano then told Mayo that he was there to talk to the 2 night employees at the mill, James DeGroat and Nicholas Picozzi. Mayo volunteered to accompany Marziliano. When Marziliano and Mayo reached the mill, they found DeGroat and Picozzi on the roof, working (sweeping sawdust to, and over, the edge of the roof). Marziliano whistled to DeGroat and Picozzi and they "came down off the roof." Picozzi at that point, had not signed a Union authorization card. Mayo testified on direct examination that Marziliano spoke to Picozzi at that time, trying to give him all the good things about [the Union] and then he just gave him his card ... and said, "Give me a call." Although Mayo testified that Marziliano's discussion with Picozzi lasted "approximately 15 minutes," he denied being able to remember anything else that Marziliano said to Picozzi. Mayo testified that the conversation between Marziliano and Picozzi occurred "outdoors."

Mayo further testified that when he reported to work on August 12, he was called to the office of James DiPerri, the manager of the mill. DiPerri was not there, but supervisors Eric Ryder and Ken Esolen were. DiPerri was on a speaker phone. DiPerri, according to Mayo, "said I was doing a real good job but due to the fact that I was on the property after hours with another person he had to let me go." On cross-examination, Mayo denied that he and Marziliano went into the mill on August 11. Mayo first evaded the question of whether Marziliano attempted to get Picozzi to sign an authorization card; then Mayo reluctantly admitted that Marziliano had.

DeGroat was also discharged on August 12. When asked on direct examination what his job with the Respondent had been, DeGroat replied, "Well, I was supposed to have been security but they also had me doing other work, like maintenance and stuff like that." DeGroat testified that, when Marziliano whistled on August 11, Picozzi went to the ground first. DeGroat continued sweeping sawdust for a few minutes, but then he went to the ground to join the 3 other men. DeGroat testified that he heard Picozzi accuse Marziliano of "pressuring" him to sign a Union authorization card. DeGroat was asked on direct examination, and he testified:

Q. Why didn't you call the police on that date?

A. I didn't call the police 'cause downstairs there was -- when I first heard it, there didn't seem like there was no reason to call the police for 'cause they were getting along good downstairs at first. Then all of a sudden Picozzi just got loud and said, "What are you pressuring me for?" Then he [Marziliano] didn't say no more and he just turned and walked away, that was it.

(DeGroat did not testify that he had no responsibility to call the police, even when non-employees such as Marziliano enter the property after hours.) DeGroat testified that the conversation between Marziliano and Picozzi, at least the part that he heard, lasted "between two to four minutes."

DeGroat testified that he also was terminated by DiPerri, by telephone. According to DeGroat, DiPerri asked him if he knew Marziliano; when DeGroat replied that he did, DiPerri accused him of being a participant in Marziliano's pressuring Picozzi on the night before. DiPerri then told DeGroat that he was terminated.

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On August 13, DiPerri sent DeGroat and Mayo letters reciting the reasons that they had been discharged. DiPerri stated that Mayo had been discharged for "the following Company policy violations" on August 11: [1] "Unauthorized access by yourself onto company property after scheduled working hours." [2] "Escorting an unauthorized non-employee onto company property after scheduled working hours." And [3] "Intimidation / harassment of another company employee on company property." DiPerri sent DeGroat an essentially identical letter, except that the policy violations were listed as: [1] "You granted unauthorized entrance to another employee onto company property after scheduled working hours." [2] "You granted unauthorized entrance to a non-employee onto company property after scheduled working hours." And [3] "Intimidation / harassment of another company employee on company property."

DeGroat at first flatly denied ever receiving instructions about allowing "others" to come on to the Respondent's property. Then DeGroat testified that, although he cannot read or write, he "might have" been told that there was such a prohibition when he was hired for security by the Respondent. Vernold, who was employed by the Respondent from its takeover of the business, and by Mallery for many years before that, denied that the Respondent had issued any documentation stating that employees could not return to the property after hours.

Marziliano, as previously noted, testified for the General Counsel, but he was not asked about the events of August 11.

In the Respondent's case, Picozzi testified that, on August 11, he went to the front edge of the roof of the mill, and DeGroat went to the edge at the back, to see where the whistling was coming from. Marziliano and Mayo were on the ground at the back of the mill. After Marziliano and Mayo asked DeGroat and Picozzi to come down, Picozzi and DeGroat left the roof at the same time. Picozzi and DeGroat went through a "cellar" door in the roof and down a stairway inside the mill. When he and DeGroat got to the ground, and to the area just outside the front door of the mill, Marziliano and Mayo were already there. According to Picozzi, Marziliano and Mayo necessarily walked through the mill, from the back to the front, because:

In other words, if you had to walk around the building it would take longer, I would have beat you to the front of the building. So the back door of the mill was open. So they had come through the building 'cause they were already there by the time I got off the second floor of the roof.

Picozzi further testified that when he and DeGroat reached the point where Marziliano and Mayo were standing outside the front of the mill, Marziliano said that "he was there for me to sign a Union card" and that "otherwise, I'd lose my job; the guys would push me to quit." Picozzi told Marziliano that he would consider signing an authorization card later, but he refused to sign one at that time. Marziliano gave Picozzi his business card and then left with Mayo. Picozzi estimated that Marziliano had been on the property for almost an hour, during which time neither he nor DeGroat were on break. Picozzi testified that neither he nor DeGroat asked Marziliano or Mayo to leave the property.

Picozzi further testified that, after Marziliano and Mayo left the property on August 11, he returned to the roof and continued sweeping. Then, at his break, Picozzi telephoned Esolen and reported what had happened. When he came to work on the following day, Picozzi signed a statement that was typed by the office secretary, which statement comported with his testimony. Specifically Picozzi's written statement to the Respondent includes comments that: (1) Marziliano and Mayo went into the interior of the mill; (2) when attempting to get Picozzi to sign an authorization card, Marziliano told him that if he did not sign it, "the other employees who have signed would work on [me] until [I] quit or would be fired"; and (3) "Richard Mayo named employee names that have signed cards."

Picozzi further testified that, about a month before August 11, the Respondent distributed a memorandum in the paychecks that stated that off duty employees and strangers were not allowed on

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the property unless permitted by DiPerri or another supervisor. ¹⁶ Before that distribution, Picozzi's wife had sometimes come onto the property to bring him food, but not thereafter. On cross-examination, Picozzi further testified that on August 11, when "Rich Mayo and Frank [Marziliano] came on to the property, they said they would work on getting, you know, [me] fired. ... The guys would be pressuring me."

As evidence that demonstrates disparate treatment of DeGroat and Mayo, the General Counsel relies upon testimony by Vernold that he had seen employee David Lester walking his dog on the Respondent's property after hours. (Lester owns a house, the lot of which is contiguous to the Respondent's property.) The General Counsel further relies on testimony by Mayo that he had see a mother of one employee, and the girlfriend of another, drive onto the property and drop the employees off or pick them up, in neither case entering the mill. Vernold knew of no discipline that was meted out because of either practice. Vernold, however, was not asked if these things happened after the Respondent took over the operation of the mill. As further evidence of disparate treatment, the General Counsel relies on testimony by DeGroat that Picozzi sometimes would allow a friend of Picozzi to come on the property, outside, during breaks, to discuss hunting and fishing. DeGroat did not testify whether such occurrences were before or after the Respondent assumed operation of the mill. The General Counsel offered no evidence that the Respondent's supervisors knew of this conduct by the employees which Vernold and DeGroat described. Finally, the General Counsel argues that the Respondent's not discharging Picozzi for stopping work on August 11 when Marziliano came on the premises reflects disparate treatment of DeGroat and Mayo.

Section 8(a)(1) allegations

Vernold testified that Becker conducted a meeting of all unit employees shortly after DeGroat and Mayo were discharged. Becker, according to Vernold, stated that one employee had been discharged for bringing "unauthorized personnel" onto company property and that another had been discharged because he was guard who had allowed the first discharged employee to do what he had done. Further according to Vernold, Becker "went on to say about how this Union wasn't a good thing and the employees should ask for their cards back." Vernold admitted on cross-examination, however, that Becker told the employees that they should ask for their cards back "if you felt you were coerced" into signing one. Vernold further admitted that some employees at the meeting asked Becker how they could get their authorization cards returned. Also, current employee Robert Ryder testified that "Mr. Becker commented that the Union should return the cards if asked to do so; if anybody felt that they were coerced or intimidated by signing the card, that they should ask for their card back." Based on the testimony by Vernold and Ryder, the complaint alleges, at paragraph VI(a), that the Respondent, by Becker, (i) told the employees that DeGroat and Mayo had been discharged for union activities, and (ii) encouraged employees to inform the Union that they no longer supported it and that they wanted the Union to return authorization cards that the employees had signed. Vernold and Ryder agreed that, at the end of the meeting, employee Timothy Wormuth spoke up and volunteered to attempt to get the authorization cards back to the employees who had signed them.

Vernold further testified that at a meeting of employees which Becker and Rossi conducted on September 23, Rossi told the employees:

... that he had been financing the place primarily with all of his own money, that he was the sole owner and that he had honored his commitment to George Meade, who was the previous owner when it was Mallery, that things weren't looking very good and that he was trying to get investors but he was unable to get any investors and if he wasn't able to get investors, that we would have -- probably end up closing and liquidating the place. And he also said that if any of us had any job offers we ought to seriously think about pursuing them. ...

¹⁶ The Respondent did not offer any documentation of this rule.

[T]hen Mr. Becker stated that the reason that they were unable to get any investors interested in it was because of, "the Union cloud" was the terminology used. ...

[Becker further said] that it was possible that if they weren't able to get investors, that they would have to liquidate the mill or the property or whatever. ...

[Becker then] went to asking us to get our cards back, [and said that] if we abandon the Union then they would be able to proceed with getting investors and we would be in good shape.

Robert Ryder testified consistently with Vernold, but he added that Becker told the employees "that he would assist in trying to get the cards back, that people should make telephone calls, sign petitions, write letters asking for the cards back." Based on this testimony by Vernold and Ryder, the complaint alleges, at paragraph VI(b), that the Respondent, by Becker and Rossi, unlawfully, again, (i) encouraged employees to tell the Union that they no longer supported it and that they wanted their authorization cards returned, and (ii) threatened to close the sawmill because of the employees's union activities. Vernold and Ryder testified that this meeting also closed with Wormuth's again stating that he would assist employees in getting their authorization cards returned.

Vernold further testified that in December Becker and Rossi conducted another meeting of employees. According to Vernold:

Mr. Rossi said that Mr. Becker was going to Albany weekly to answer [unfair labor practice] charges that the Union was filing and that it was costing them \$5,000 a week to answer to these charges. He mentioned how he was pleased with the response to the guys about getting their cards back. He thought that that was encouraging but that he wouldn't be able to put any money into the mill because of the \$5,000 a week that they were spending fighting the Union. ...

Tim Wurmoth made mention of the fact that he would still try and get cards back for the guys.

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Mr. DiPerri mentioned that if anybody wanted to use the Company phones to contact Frank [Marziliano], that they would be able to go ahead and use the Company phones rather than call from their own home phone numbers. ...

[A]gain [Rossi] reiterated the fact that he was unable to find any investors because of the Union cloud.

(The Union's office is in Hawthorne, New York, which, is approximately 100 miles from the Hancock area; that is, telephone calls to the Union would necessarily be at long-distance rates.) Robert Ryder testified consistently, including testimony that Rossi added "that he was still have difficulty with getting backers for the Company because of the Union, that he wanted people to call and try to get the cards returned." Based on this testimony by Vernold and Ryder, the complaint alleges, at paragraph VI(c), that the Respondent, by Rossi, (i) told the employees that he had decreased his investment in the mill because the Union had filed unfair labor practice charges that were then being investigated by the Regional Office, (ii) told employees that outside investors were reluctant to invest in the mill because some of them supported the Union, (iii) told employees to contact the Union and state that they no longer supported the Union and wanted their authorization cards returned, (iv) asked employees to stop supporting the Union, and (v) offered assistance to employees in rejecting the Union by granting employees access to its telephones to contact the Union during work time.

Former employee Steven Jandreau testified that in January 2005 he observed supervisors Eric Ryder and Ken Esolen handing out small slips of paper to employees. Ryder approached Jandreau and handed him one of the papers. The paper bore Marziliano's name and business-telephone number. Ryder "asked" Jandreau to call the number, say that he did not want to be represented by the Carpenters Union, and to "sign the back of the card and date it and hand it in." Jandreau replied that he would make the call when his break time came, but Ryder "insisted" that he immediately make the

¹⁷ Jandreau originally testified that Ryder "told" him to call the Union, but then he corrected himself.

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call from an office telephone. Jandreau went into the office and made the call. As Jandreau placed the call, Ryder stood in the office's doorway, about 10 feet from Jandreau. Marziliano did not answer Jandreau's call; instead, Jandreau heard only a voice-mail message. Jandreau left a message that he did not wish to be represented by the Union. Then he signed the paper, dated it and returned it to Ryder. Based on this testimony by Jandreau, the complaint alleges, at paragraph VI(d), that the Respondent, by Ryder and Esolen, (i) encouraged employees to reject the Union, (ii) assisted employees in rejecting the Union by offering the use of the Company telephone, and (iii) surveilled an employee who was speaking to the Union on the telephone.

Vernold further testified that in January 2005 DiPerri approached him as he worked, handed him a slip of paper, and:

Mr. DiPerri ... said, "I know what your feelings are on this but I've got to give you this slip of paper. It has Frank Marziliano's phone number on it and we'd like to have you call to ask for your card back. If you do, on the back of it please put down the date and the time that you called so we can verify that you called."...

I just said, "Well, you're right; you know how I feel and I probably won't make that call." He said, "Well" -- he understood that.

Based on this testimony by Vernold, the complaint alleges, at paragraph VI(f), ¹⁸ that the Respondent, by DiPerri, (i) encouraged employees to reject the Union, (ii) told an employee to contact the Union and state that he no longer supported the Union and wished his Union authorization card returned, and (iii) encouraged an employee to "sign a revocation card and return it directly to [DiPerri]."

For the Respondent, employee Wormuth testified that at the September 23 meeting, an employee asked what could be done to get the cards returned. Becker replied that the employees "could ... just go and get them ourselves" from Marziliano. At one of the early meetings, after Becker again stated that the employees could get their authorization cards returned from Marziliano, an employee asked for Marziliano's telephone number; DiPerri said he "could get the number for the employees who wanted it." Wormuth further testified that he created and circulated the petition disavowing the Union that Marziliano testified had been received by him in January. On cross-examination, Wormuth testified that at the meetings, Rossi and Becker said that the Respondent was having difficulty finding investors, but he denied that Rossi and Becker said why. Wormuth denied that anyone in management had ever told him that he could use company telephones for personal calls, although he had done so.

DiPerri testified that, although he attended the December meeting that was conducted by Rossi and Becker, at that meeting he said nothing to the employees. Specifically, DiPerri denied telling the employees that they could use company telephones to call the Union. DiPerri further testified that, after the January meeting in which an employee asked how to get his Union authorization card returned, he had a secretary print up slips of paper with Marziliano's name and telephone number. DiPerri testified that he approached each employee and told them:

... if you're interested in calling Frank and letting him know what your true intentions are, here's his number and if you want to just throw it in the trash [because] you're not interested in it, I could [not] care less one way or the other.

DiPerri testified that he told the same to Vernold. DiPerri further denied that he ever had a discussion with Vernold in which getting a return of Vernold's authorization card was mentioned. On cross-examination DiPerri testified that Rossi and Becker told the employees at the meetings that if the mill were unionized, "They may not be able to find people interested to put the capital into the business

¹⁸ The General Counsel offered no evidence in support of paragraph VI(e) of the complaint, and the allegations of that paragraph are accordingly dismissed.

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that it needs to continue it going." DiPerri denied that Rossi threatened to close the mill, but he did admit that Rossi told the employees "The threat of union activity at the facility may be the straw that broke the camel's back."

Esolen denied that he distributed any papers with Marziliano's name or telephone number. Eric Ryder testified that he had seen and heard employees asking DiPerri how to contact the Union and that DiPerri once told him that he was going to distribute Marziliano's number to the employees. Ryder denied distributing papers with Marziliano's name and telephone number, but he admitted that he once asked Jandreau if he had called Marziliano yet. Jandreau replied that he would call Marziliano at a break. Ryder denied responding to Jandreau, and he denied standing in a doorway while Jandreau made a telephone call. Ryder also testified that employees were free to use the mill telephones on breaks. On cross-examination, Ryder testified that he asked Jandreau if he had called the Union because DiPerri had told him to ask each of the employees under his supervision if he had done so. Further on cross-examination, Ryder admitted that during his meetings with the employees, Rossi told them that "if we had a union here, that, you know, that he couldn't, he couldn't run the place any longer." Ryder further admitted that Rossi told the employees that, in reference to the mill, "[W]e can't operate it with the Union cloud hanging over our head," and "investors won't invest in the place as long as this Union cloud is over our head."

Becker testified that at his August 17 meeting with employees, after he stated the reasons for the discharges of DeGroat and Mayo:

I went on to say that if any of the employees felt that they had signed a signature card for the union under such pressure, or coercion, or threatening, that they should get it back. ...

I believe I might have said that if that was the case, would they come to me and I would assist them, if they felt that they were threatened, coerced, or pressured into signing those cards, I would assist them in obtaining their return.

Becker denied, however, that he told the employees that DeGroat and Mayo were discharged for union activities. Becker further denied that, during the September 23 meeting, he or Rossi threatened to close the mill. Becker did not, however, deny encouraging employees at this meeting to attempt to have their authorization cards returned to them, as Vernold and Robert Ryder testified.

Becker testified that, at a December 2 meeting with the employees, he told them that it did not appear that Wormuth's petition to the Union had done any good. When the employees asked what else they could do to get rid of the Union, Becker told them only that "you call again and express your opinion regarding representation directly to Frank and to the union people." Becker denied telling the employees to contact the Union. When asked if at the December 2 meeting Rossi told the employees that he was decreasing his investment in the mill because of the unfair labor practice charges that had been filed, Becker replied: "No, he did not. I do not recall him making that statement."

On cross-examination Becker admitted that, as he had stated in a position letter to the Regional Office, at the September 23 employee meeting, Rossi told the employees that "the threat of union activity at the facility may be the straw that broke the camel's back in terms of his ability to keep the facility running and build its production levels, so that it once again became profitable and appealing to other investors and operators."

Rossi testified that on September 23 he met with the employees and told them that the Respondent was having troubles getting the mill into full production and that:

[W]e had a certain amount of money that we could commit and we've used that all up and right now we're in a situation where unless I find other partners or financial partners or have the ability to refinance it, it's highly unlikely we can continue to run the mill. We're delinquent on our taxes,

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we haven't been able to pay real estate taxes, we've tapped out all our lines of credit, it's suffering losses every month what are just -- that are just being funded by myself and -- or internally by liquidating inventory, so at that point that process had just begun. We could see that we were at the end of the line. ...

They did ask me why I was having trouble. ...

I was honest with them, I said, "There's a Union cloud over the mill, one of the reasons I can't find investors. I particularly can't find investors from within the industry."

I was not able to attract anyone from within the hardwood industry to invest or purchase the mill because of the Union -- and I used the word "Union cloud" only because that's exactly what two of the investors that we talked to had said, you know, they're just not even interested in considering it.

Rossi denied, however, that he told the employees that the mill might close because of the Union.

Rossi testified that at his December meeting with employees he told them that charges had been filed against him, but "nobody was going to stop me from talking to them." Rossi then told the employees that there were no new investors and:

[I]f we were going to bring the mill up to full production levels, regular production levels there was a significant amount of capital that had to be invested and I was in the middle of making a decision on whether to go forward with that because if -- had we not put that investment in place we wouldn't have been able to run the mill.

We had an obsolete carriage -- a main component of the mill was obsolete and we were told by the manufacturer that if it went down there was no replacement parts. It required an investment of nearly a quarter of a million dollars to be made and made relatively quickly and we were looking at whether we were going to make that investment or shut the mill down. And we didn't say "shut the mill down" to the employees, but those were our alternatives. ...

I shared to them that I was considering making an investment in a piece of equipment, [but] it was hard to make that determination given the uncertainty of whether we could finance this in the future and whether we could bring a resolution to our Union issues.

Rossi further testified that after his December presentation the employees asked what they could do to get the Union "behind us." He told them that they had the right to request their authorization cards back and if a "majority of them wanted their cards back that the Union would walk away." Rossi testified that he told the employees this because that is what Marziliano had told him and Becker at the September 3 meeting.

Conclusions—The Section 8(a)(1) allegations

Paragraph VI(a)(i)(ii) of the complaint alleges that in August, in violation of Section 8(a)(1), Becker told the employees that DeGroat and Mayo had been discharged because they had engaged in union activities and that the remaining employees should contact the Union and have their cards returned. In support of these allegations, the General Counsel called only employees Vernold and Joseph Ryder. Vernold testified that Becker told the employees that one (unnamed) employee had been discharged for bringing an unauthorized person on the premises and that another (also unnamed) employee had been discharged for allowing the first employee to do it. Moreover, Vernold and Ryder testified that Becker told the gathered employees that they should seek the return of their authorization cards if they felt that they had been coerced into signing them. Becker readily admitted that he told the employees that 2 employees had been discharged for being part of an incident that "involved what we considered coercion, threatening, applying pressure to an employee with the objective of obtaining a signed authorization card." Becker further admitted that he told the employees that they should seek return of their authorization cards if they felt that they had signed them because of "pressure, or coercion, or threatening." Becker added that he also told the employees that "I would assist them in obtaining their return."

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On brief, neither the General Counsel nor the Charging Party advance any argument or authority in support of the allegation of paragraph V(a)(i) that what Becker told the employees about the discharges of DeGroat and Mayo somehow constituted a statement that the 2 alleged discriminatees had been discharged for protected union activities. Although, as he admitted, Becker told the gathered employees that the discharges of DeGroat and Mayo grew out of an event of cardsolicitation, I credit his testimony that he qualified that statement by telling the employees that the event had involved "pressure, or coercion, or threatening." I do not believe that any reasonable employee would have concluded that, by that qualified statement, Becker was telling the group that DeGroat and Mayo had been discharged for union activities or lawful solicitations. I shall therefore recommend dismissal of this allegation of the complaint.

Paragraph VI(a)(ii) of the complaint alleges that in his August speech to the employees Becker unlawfully encouraged employees to ask the Union for return of their authorization cards. As recently stated in *The Jewish Home for the Elderly*, 343 NLRB No. 117 (2004):

The Board has held that an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation. 19

That is, a violation by encouraging employees to seek return of their authorization cards occurs only where the employer's encouragement takes a form that would indicate to employees that their employment is in peril if the encouragement is not heeded. I find that Becker's September statement to the group that he would assist employees in securing the return of their authorization cards, without more, would not reasonably have made the impression on the employees that their employment would be in peril if they refrained from seeking such assistance. I shall therefore also recommend dismissal of this allegation of the complaint.

On September 23, the Respondent made another attempt to get the employees to seek return of their authorization cards. This time, however, the request was accompanied with expressions of the dark alternative of plant closure. Vernold testified that Becker told a gathering of employees that "we should ask for our cards back, that if we demonstrated that the guys wanted their cards back that it would be possible then for the Union to be ignored or defeated." Robert Ryder testified that Becker also stated "that he would assist in trying to get the cards back, that people should make telephone calls, sign petitions, write letters asking for the cards back." Becker did not deny this testimony. In addition, Vernold testified that on September 23, Rossi told the gathering of employees that, if more investors were not secured, the Respondent would "probably end up closing and liquidating the place." Rossi testified that he told the employees that a "union cloud" was keeping him from getting the investors and causing him to begin "liquidating inventory." I credit Vernold. Liquidating inventory is also called "selling"; liquidating inventory is something that producers or manufacturers such as the Respondent are always trying to do. Rossi did not say that he was liquidating inventory (because of "the Union cloud" or any other reason). Moreover, even Becker admitted that Rossi told the employees at the September 23 meeting that "the threat of union activity at the facility may be the straw that broke the camel's back in terms of his ability to keep the facility running and build its production levels, so that it once again became profitable and appealing to other investors."20 If Rossi could not "keep the facility running," of course, he was going to close it. That is, even according to the version offered by Becker, a threat of closure was the impression on the employees that Rossi's remarks reasonably would have made. I therefore find that the Respondent's September 23 appeal to

the employees that they attempt to secure the return of their Union authorization cards was

¹⁹ Emphasis added.

²⁰ Consistently, DiPerri testified that Rossi told the employees that "the threat of union activity at the facility may be the straw that broke the camel's back.'

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accompanied by a threat that, if they did not do so, the Respondent would "probably end up closing and liquidating the place." ²¹

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Supreme Court described what employers may lawfully say about the consequences of unionization.

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

The Court chose the word "demonstrably" for a reason. Employers are not free to confront employees with a threat of dire consequences such as plant closure without demonstrating to those employees that the threat has some objective basis in fact. As succinctly stated by the Board in *Center Construction Company*, 345 NLRB No. 45, fn. 15 (August 27, 2005): "We agree that an employer must articulate the objective evidence supporting its prediction." The Board made clear that the required articulation, or demonstration, must be made to the employees who hear the prediction of plant closure by noting that in *Systems West LLC*, 342 NLRB No. 82 (2004), an unlawful threat of plant closure was found, in part, because "the employer offered no evidence *to the listening employees* justifying these predictions." (Emphasis supplied.) *Curwood, Inc.*, 339 NLRB No. 48 (2003), the only case on the point that is cited by the Respondent, is not to the contrary. In *Curwood*, the Board found that the employer's statements about potential plant-closure were not coercive, but only after citing the above-quoted passage of *Gissel* and noting that the employer had "provided objective material reflecting its customers' concerns" in its letters to employees.

On September 23, neither Becker nor Rossi offered the employees any objective evidence that additional investors were needed to avoid (another) shutdown of the sawmill; nor did they offer any evidence that needed investors could not be found. Rossi and Becker, therefore, threatened the employees with plant closure if they continued in their selection²² and designation²³ of the Union as their collective-bargaining representative without offering the employees any "objective fact to convey ... demonstrably probable consequences beyond [the Respondent's] control" within *NLRB v*. *Gissel Packing Co*. Accordingly, I conclude that by Becker's and Rossi's soliciting employees to disavow the Union and seek return of their authorization cards, and by their doing so upon the threat of closure of the facility if that solicitation was not heeded,²⁴ the Respondent violated Section 8(a)(1) as alleged in paragraphs VI(b)(i) and (ii) of the complaint.

Rossi and Becker conducted another employee meeting in December. Several other supervisors were present, but the complaint names only Rossi as the one who made coercive remarks. Vernold testified that Rossi stated that he was pleased with the employees who had requested return of their cards, but that he was spending \$5,000 per week to have Becker go to the Board's Regional Office to answer the charges that had been filed, so "he wouldn't be able to put any [more] money into the mill because of the \$5,000 a week that they were spending fighting the Union." Vernold further testified that Rossi "reiterated the fact that he was unable to find any investors because of the Union cloud."

²¹ Consistent with this finding are the admissions of supervisor Eric Ryder that Rossi told the employees at some meetings that, "if we had a union here ... he couldn't run the place any longer," that "we can't operate it [the sawmill] with the union cloud hanging over our head," and that "investors won't invest in the place as long as this union cloud is over our head."

over our head."

22 I refer to the employees' choice of the Union in the 2002 Board-conducted election when the plant was owned by Mallery.

²³ I refer to the authorization-card majority that the Union had secured by September 23.

²⁴ These employees who had recently suffered from an extended period of plant-closure were especially likely to pick up intended implications ... that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, supra, at 617.

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Rossi did not, in any significant respect, deny this testimony. In fact, Rossi acknowledged that he told the employees at the December meeting that further investment was needed, but "it was hard to make that determination given the uncertainty of whether we could finance this in the future and whether we could bring a resolution to our Union issues." Rossi and Becker had told the employees in September that more of his investment, and the investments of outsiders, were necessary to "keep the facility running." Rossi's statements that the necessary investments would be reduced or eliminated if the "Union issues" could not be resolved were therefore further unsubstantiated threats to the employees. At the same time that Rossi was threatening the employees in this manner, he expressed thanks because some of them had made efforts to secure return of their authorization cards. That expression, and those threats, support the allegations of the complaint's paragraphs VI(c)(i) and (ii) that Rossi told the employees that he would invest less money in the mill because of the Union and that other investors would invest less because of the Union. Moreover, Rossi's coercive remarks about the future denials of investments were, in effect, orders that the employees to continue to contact the Union to secure return of their authorization cards and a coercive request that the employees stop supporting the Union, all in violation of Section 8(a)(1), as alleged in the complaint's paragraphs VI (c)(iii) and (iv).

The Respondent allowed (and even, compelled, as I find infra) the employees to call the Union on its telephones to seek return of their authorization cards. The complaint alleges that in the December meeting Rossi coercively offered the use of the Company phones for the employees to make the calls. Vernold testified that the offer was made during Rossi's speech, but by DiPerri rather than Rossi. DiPerri denied speaking during the December meeting, and I found DiPerri credible in that testimony. As I later find herein, DiPerri was actively involved in getting the employees to use the Company phones to call the Union, and it is therefore possible that Vernold confused the later acts with the December offer. It is moreover possible that Rossi made the statement about the phones, because he was the supervisor who was doing most of the talking. But to so find would rest on speculation in which I shall not indulge. I shall therefore recommend dismissal of paragraph VI(c)(v) of the complaint.

Former employee Jandreau testified that in January 2005 supervisor Eric Ryder approached him and handed him a paper that had on it Union representative Marziliano's name and businesstelephone number. Ryder asked Jandreau to call the number, say that he did not want to be represented by the Carpenters Union, and to "sign the back of the card and date it and hand it in." Jandreau tried to stall Ryder off, but Ryder insisted that he immediately go to the office and make the call. When Jandreau complied, Ryder stood in the office's doorway, about 10 feet from Jandreau, where he could easily listen. Ryder admitted that DiPerri once told him that he was going to distribute Marziliano's number to the employees, and he admitted that he once asked Jandreau if he had called Marziliano yet, but he denied distributing papers with Marziliano's name and telephone number. Ryder further denied standing in a doorway while Jandreau made a telephone call. To the extent that they differ, I credit Jandreau, a seemingly ingenuous former employee who had apparently nothing to gain by false testimony. Especially in view of the preceding threats by Becker and Rossi that the mill would be closed if the employees did not revoke their authorization cards, I find that Ryder unlawfully encouraged employees to reject the Union, assisted an employee in such a rejection by offering the use of (long-distance) telephone service, and surveilled an employee who was attempting to speak to the Union representative on the telephone, all in violation of Section 8(a)(1), as alleged in paragraph VI(d) of the complaint.

Vernold testified that in January DiPerri presented him with a piece of paper that had Marziliano's name and telephone number on it and told him that "we'd like to have you call to ask for your card back." DiPerri admitted distributing such papers to employees but denied asking any employee to do anything with them. That is too much to believe, and I do not. I believe, and find, that DiPerri asked Vernold to call Marziliano and request return of his authorization card and, as Vernold further credibly testified, told Vernold to record the time that he made a call and return the paper to

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DiPerri.²⁵ These actions were more than mere suggestions and, especially in view of the management threats that had preceded them, took on a coercive nature. I therefore conclude that, as alleged in paragraph VI(f) of the complaint, the Respondent, by DiPerri's conduct toward Vernold, violated Section 8(a)(1).

Conclusions—The Section 8(a)(3) allegations

As stated by their respective discharge letters, Mayo was discharged for entering the company property after hours, escorting a non-employee (Union representative Marziliano) onto the Company's property, and harassing and intimidating another employee, Picozzi. DeGroat, a guard, was discharged for allowing Marziliano and Mayo onto the property and harassing and intimidating Picozzi.

There is no doubt DeGroat and Mayo engaged in the conduct that the Respondent attributed to them. Mayo caught up with Marziliano in the driveway, and then escorted him to, and through, the mill. I do not believe Mayo's testimony that he and Marziliano did not go to the interior of the mill. At any rate, it is undisputed that, at the time of the discharges, Picozzi, in writing, had told the Respondent that Marziliano and Mayo had gone into the interior of the mill. There is no reason for finding that the Respondent did not, in good faith, believe Picozzi's report. At the time of the discharges, Picozzi had further reported to the Respondent, in writing, that Marziliano told him that, if he did not sign an authorization card, the employees who had already signed authorization cards would "work on him until he quit or would be fired." And at the time of the discharges, Picozzi had informed the Respondent, in writing, that Mayo had joined Marziliano in making such coercive remarks by naming other employees who had already signed authorization cards and presumably would "work on" Picozzi if he did not sign an authorization card.

On brief, the General Counsel and the Charging Party fault the Respondent for not proving that its no-access rule existed, or, if it did, that the rule comported with the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), which states that employers may bar off-duty employees from its premises, but:

[S]uch a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

The Respondent's evidence that a valid no-access rule existed is weak, but the Board did not issue *Tri-County* to license non-employees such as Marziliano to come onto an employer's property without authorization, it was not issued to allow employees such as Mayo to escort non-employees onto employers' property, *and into the interior of buildings on such property*, and it was not issued to license coercive tactics such as those which Marziliano used against Picozzi and in which Mayo actively participated (at least by naming some of the employees who had already signed Union authorization cards). Nor did the Board issue *Tri-County* to allow guards, such as DeGroat, to do nothing when non-employees enter employers' property.

The General Counsel and the Union argue that Section 8(a)(3) violations by the discharges of DeGroat and Mayo have been established under *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *Transportation Management*, *Inc. v. NLRB*, 462 U.S. 393 (1983). A prima facie case under *Wright Line*, however,

The obvious reason that DiPerri asked Vernold to make the notations of time was so that the Respondent could compare its future long-distance bills with the reported times of employees' calls on its telephones.

Picozzi testified to the same effect, and, especially in view of Marziliano's failure to dispute the testimony, I credit

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requires proof that the alleged discriminatees have engaged in statutorily protected union or concerted activities of which the employer has actual or constructive knowledge. As evidence of such activities, the General Counsel and the Union point only to Mayo's and DeGroat's activities of August 11. Those activities, however, have not been shown to have been statutorily protected. Again, the Act, as it has been interpreted by the Board and the courts in following *Tri-County* and other such cases, does not protect the activity of a guard in allowing non-employees onto an employer's property after hours, and it does not protect the activity of a non-guard in escorting such a non-employee onto the property (and even into the interior of a building) and participating in harassment of other employees.²⁷ That is, under *Wright Line* the General Counsel has failed to establish prima facie cases that DeGroat and Mayo were unlawfully discharged. I shall therefore recommend dismissal of the Section 8(a)(3) allegations that have been made on behalf of those employees.

Conclusions—The Section 8(a)(5) allegation

When the contractual grace period began

In the July 7, 2003, recognition agreement, the parties agreed to use the date of the sawmill's "first daily regular production runs" as the beginning of an 8-month "grace period" in which recognition could not be sought by the Union. When that date occurred is a matter that is in sharp dispute.

The General Counsel and the Union argue that under the Recognition Agreement "the first daily regular production runs" began on November 24, 2003, on which date the mill produced 7,058 board feet of lumber for sale. This position essentially adopts the testimonies of Jones and Marziliano that, during the negotiation of the Recognition Agreement, the parties were in agreement that the grace period would start with the "first regular order of cuts." If such a first-order-cut standard had actually been agreed to, the parties could have easily expressed that agreement in writing. They did not do so. Moreover, acceptance of the testimonies of Jones and Marziliano would require this finder-of-fact to ignore the plain meanings of "daily" and "runs" (plural) as those words are used in section II(D)(1) of the Recognition Agreement. The testimonies of Jones and Marziliano on this point therefore cannot be credited and the position based upon those testimonies must be rejected. On the other hand, if the parties had been in agreement that the grace period did not start until the Respondent produced lumber for multiple consecutive 5-day weeks, as Becker's testimony would indicate, and as the Respondent argues on brief, the parties also could have easily drafted such a standard. They did not do that, either. The standard of the parties also could have easily drafted such a standard.

During the week of December 8, 2003, the Respondent operated the mill for 5 full days, averaging 18,301 board feet of production per day. This daily production was at least somewhat larger that Mallery's minimum daily production during its last year of operations (16,435 board feet). That is, starting December 8, the Respondent had a full week of production, and during that week it bested at least the minimum weekly production that Mallery had achieved during its last year of operation. For this reason, I find that the grace period under the Recognition Agreement began on December 8, 2003. The Union's August 16 demand for recognition came more than 8 months after that point; I therefore find and conclude that the Union's demand for a card-check and recognition under the Recognition Agreement was not premature as Becker argued in his letters of August 19 and thereafter, and I find and conclude that the Union did not, as suggested by Becker in his letters and testimony, breach the Recognition Agreement by making that demand when it did.

²⁷ Certainly, the Act does not protect employees' joining in with a non-employee such as Marziliano in entering an employer's property to interrupt other employees, such as Picozzi and DeGroat, while they are working.

²⁸ Becker's testimony that Jones would not agree to a board-feet standard was not credible; Becker testified that he would not have proposed such a specific standard himself, and Jones would not have had the information necessary to make such a proposal intelligently.

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The Respondent as a successor to Mallery

The Supreme Court, in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), held that a new employer such as the Respondent has a duty to recognize and bargain with an incumbent Union when there is a continuity of the work force and a continuity of the enterprise. In order to establish a continuity of the work force, the employees who had been employed in the predecessor's bargaining unit must comprise a majority of the new employer's complement within that same bargaining unit. In this case, with only one or 2 exceptions, all of the Respondent's employees at the time of the Union's August 16 demand for recognition had been employed by Mallery. There is therefore no question that the *Burns* element of continuity of the work force is present.

As most recently articulated in *Siemens Building Technologies*, 345 NLRB No. 91 (September 30, 2005):

In evaluating the continuity of the enterprise, the Board looks to the following elements: (1) whether there was been substantial continuity of the same business operations; (2) whether the new employer uses the same facilities; (3) whether the same jobs exist under the same working conditions; (4) whether the new company employs the same supervisors; (5) whether the same equipment, machinery or processes are used: (6) whether the same products or services are offered; and (7) whether the new employer has basically the same body of customers. *Fall River Dyeing*, supra [*Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39-40 (1987)]; see also: *Sierra Realty Corp.*, 317 NLRB 832 (1995); *Nephi Rubber Products Corp.*, 303 NLRB 151 (1991), enfd. 976 F.2d 1361 (10th Cir. 1992). The totality of the circumstances frames the analysis and the Board does not give controlling weight to any single factor. *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983). ...

The Board and the courts have emphasized that the question of whether or not there is substantial continuity between the old and new business is to be examined from the perspective of the employees affected. The pertinent inquiry is whether there has been enough of a change in operations to defeat the employees' expectation of continued Union representation. *Fall River Dyeing*, supra [482 U.S. 27 (1987)]; *Premier Products*, 303 NLRB 161 (1991); *Capitol Steel and Iron Co.*, 299 NLRB 484 (1990).

The continuity of the enterprise in this case is in no more serious question than is the element of the continuity of the work force. The business operation remained precisely the same. The mill is the same, the jobs are the same (or essentially the same), several of the Mallery supervisors have been retained by the Respondent, the same equipment (albeit with one upgrade) is used, and the products are the same. That Mallery's customer base was the same as the Respondent's was not shown; but, if there was a significant difference, the Respondent presumably would have demonstrated the fact. At any rate, the totality of the circumstances clearly indicates that there was a substantial continuity of the enterprise between the operations of Mallery and the Respondent.

The Respondent's sole argument that it is not a *Burns* successor of Mallery is that there was a hiatus between the cessation of operations by Mallery and the "first daily regular production runs," of the Respondent. *Burns* and its progeny do not require "first daily regular production runs," or require anything like that privately negotiated standard, for resolution of the issue of whether there is a successor with an obligation to bargain under the Act. Nevertheless, assuming that that standard somehow applies to a *Burns* analysis, the "first daily regular production runs," as I have found, began the week of December 8. The hiatus in production, therefore, was from September 1, 2002 (when Mallery ceased production), until December 8, 2003, a period of about 15 months. The Respondent contends that such a hiatus is a bar to finding that it is a *Burns* successor to Mallery. I disagree.

The Board and the courts have never fixed an arbitrary number of months of production-lapses as a hiatus that would excuse from a bargaining obligation an entity which otherwise fits the *Burns* criteria for successorship. On brief, the Respondent cites *CitiSteel USA*, *Inc. v. N.L.R.B.*, 53 F.3d 350,

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355 (D.C. Cir. 1995), for the proposition that: "Courts have refused to enforce a Board's order finding successorship when there is a lengthy hiatus during which the prospects for the reopening of the plant were speculative." It is true that, in refusing to enforce the Board's order in CitiSteel, the court relied on the fact that there had been a hiatus in production, but the hiatus in that case was for more than 2 years. More importantly, the court found that there was a complete change in the continuity of the enterprise in which the alleged successor was engaged.²⁹ In this case, there was essentially no change in the enterprise.³⁰

Although the number of months of a hiatus in production is a relevant consideration, the issue of successorship turns more on the reasonable expectations of the employees for recall.³¹ In this case, the hiatus was interrupted, and any previously suppressed employee expectations would reasonably have been revived, by Rossi's August 14, 2003, letter to the employees stating that the Respondent and the Union were then finalizing an agreement "which would permit the sawmill at the Hancock facility to reopen" and that "over the next 30-45 days" the Respondent would be offering employment to former Mallery employees, on the same terms as they had enjoyed with Mallery, "before we extend offers to the employees from the outside." Forty-five days from August 14, 2003, was approximately October 1, 2003. Therefore, in the eyes of the employees, the hiatus of uncertainty was no more than 2½ months (October 1 until December 8), a period insufficient to vitiate all reasonable expectations of recall by the affected employees.

Hiatus in production being the only basis for the Respondent's contention that it is not a lawful successor to Mallery under Burns, and that factor having been found to be insignificant under the totality of the circumstances, I conclude that the Respondent was the successor of Mallery with an obligation to bargain collectively with the Union the representative that had been selected by the employees and certified by the Board, unless the Union waived that right in the execution and performance of the Recognition Agreement.

The limits of the Union's waiver

On brief, the General Counsel concedes that: "In Section I.A. of the Agreement, the Union agreed to a limited waiver of its statutory right to represent Respondent's employees." Therefore, there is no question that in the Recognition Agreement the Union agreed to a "clear and unmistakable waiver" 32 of its statutory right to demand that the Respondent bargain with it, at least for some period of time following the August 7, 2003, execution of the agreement. I therefore also reject the additional arguments of the General Counsel and the Charging Party that a waiver never came into effect because Becker testified that he believed that the grace period had not begun until April 2005 and because the Recognition Agreement did not expressly prevent the Union from demanding recognition before the "first daily regular production runs" had begun. The overall conduct of the parties, and their use of the term "grace period" in the Recognition Agreement, however, clearly indicate that there was intended at least some period without a potential obligation to bargain. The issue before the Board, therefore, is whether that waiver ever expired and, if so, when.

Under the Recognition Agreement, the waiver period was to end after either (a) the grace period expired and a mutually agreed-upon card checking procedure disclosed that the Union held a twothirds majority, or (b) the Respondent breached the Recognition Agreement, in which latter circumstance the Union would be free to assert that the Respondent was a successor of Mallery "under the NLRA" and therefore had an obligation to bargain with the Union. On brief, as well as

²⁹ As noted by the court at 53 F.3d 354: "CitiSteel's \$25 million infusion (almost twice the \$13 million paid for the mill itself) transformed the facility from a specialty steel mill to a 'minimill' producing a narrow range of steel products with flexible employee work practices."

 $^{^{0}}$ In fact, Becker acknowledged that sometimes "Hancock Lumber, LLC, uses a d/b/a of Mallery Lumber."

In lact, Becker acknowledged that sometimes Transcork Edinber, Ede, ases a divided Transcorption of See Fall River Dyeing, supra, See also United Food & Commercial Workers Int'l Union, Local 152 v. NLRB, 768 F.2d 1463, 1472 (D.C. Cir. 1985), a case that is cited by the Respondent on brief (and in which case the court found a hiatus of months insufficient to defeat consideration of a purchaser as a successor).

32 Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983).

arguing that the grace period had not expired at the time of the Union's August 16 demand for recognition (an argument that I have already rejected), the Respondent argues that it could not have breached the Recognition Agreement because the Union never proposed that a "mutually selected neutral third party" verify the authorization cards as required by section II(D)(2) of the agreement. The General Counsel and the Charging Party reply that the Respondent breached the Recognition Agreement by its refusals to participate in any card check, not just the unilateral one that Marziliano proposed. I agree with the General Counsel and the Charging Party.

It is true that Marziliano, in his letters of August 16 and 23, proposed only his unilateral choice of card checker (Father Bunger), at a time that was selected unilaterally by Marziliano (11:00 a.m. on August 24), and at a place that was unilaterally selected by Marziliano (which place Marziliano did not disclose to the Respondent in his letters). And, had Becker rejected Marziliano's demand for recognition solely on the basis that the card check that Marziliano was proposing was not mutually planned (as required by section II(D)(2) of the Recognition Agreement), an entirely different case would be presented to the Board. Becker, however, went much further.

In his replies of August 19 and 23, Becker stated that not only was there a lack of mutuality in the proposed card-verification process but that the Union's demand for recognition was "premature." Becker stated that, because "first daily regular production runs" under the Recognition Agreement had not yet occurred, the grace period under the Recognition Agreement had yet to start, much less was it completed. Becker's argument that the grace period had not yet been completed was false, as I have found above.³³ But Becker's making of the argument has its own significance. By his making the false argument that the grace period had not even begun, Becker was, in effect, announcing that the Respondent was never going to meet with the Union for the purpose of negotiating a collectivebargaining agreement. Becker did so by stating that, as far as the Respondent was concerned, the grace period under the Recognition Agreement would not begin until "the mill was producing as it formerly did." This was a standard of Mallery's former production, and it was a standard that the Respondent proposed during the negotiations of the Recognition Agreement. But it was a standard that that agreement did not contain. And it is a standard that, even by time of trial, the Respondent had failed to meet. That is, Becker's August 19 letter was notice that, even if Marziliano had proposed a mutual card check in August 2004, or even if he were to propose a mutual card check later, the Respondent was not going to agree to it until at least 8 months after the sawmill performed at Mallery's production levels, and performed at those levels for period of time that was to be unilaterally determined by the Respondent.

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Any lingering doubt that the Respondent was planning to stall any card-checking process indefinitely is effectively extinguished by Becker's September 10 letter in which he castigates Marziliano for even attempting to present the authorization cards to himself and Rossi at their September 3 meeting. Becker then makes it clear that the Respondent is never going to abide by the Recognition Agreement's requirement of recognition, even upon mutually verified proof of a twothirds majority, by blaming Marziliano's organizational efforts for the mill's failure to match Mallery's production. In that letter Becker further blamed the Union for Rossi's failure to secure necessary investors for the mill. By so vilifying the Union, and by doing so in a letter that it distributed to the employees, the Respondent was serving notice that it would never voluntarily recognize the Union, no matter what kind of card-majority it may subsequently receive. By its distribution of the letter, the Respondent was telling the employees that they should blame the Union for the Respondent's business disappointments, and it was tacitly assuring them that it would never negotiate with the entity that was responsible for the mill-closure that Rossi and Becker were to thereafter threaten.

³³ In another false statement that reflects an intent to default on the Respondent's contractual obligations, lawyer Becker stated in his September 19 letter that the Union had, in the Recognition Agreement, agreed to "a cessation of union activities at the facility" until the grace period was over. Of course, the Union had only agreed not to file a representation petition with the Board during the grace period.

And if Becker's September 10 letter was not sufficient to show the employees, and the Union, that the Respondent had no intention of honoring the Recognition Agreement (no matter how many authorization cards the Union was to attain, or when), on January 21 Becker wrote, again with copy to the employees, that Marziliano was "so full of shit it is coming out of your ears," and that, "we decline to schedule a negotiation session and will continue to devote our time and energy to the men in the Hancock Mill." Of course, on January 21, 2005, the Respondent was still contending that the grace period had not expired (or even begun). Therefore, even under the Respondent's interpretation of the Recognition Agreement, the Union still had the contractual right to establish an authorizationcard majority. The Respondent's January 21 denigration of the Union, however, was a further notice that the Respondent was not going to bargain, no matter what the Union may do thereafter.³⁴

Therefore, it must be concluded that, by Becker's falsely insisting that the grace period had not yet been completed, the Respondent anticipatorily breached the Recognition Agreement. The Union's waiver was thereby terminated under section I(A) of the Recognition Agreement, and the Union was thereafter free to assert, as it has continued to assert, that the Respondent is the lawful successor to Mallery. As I have found that the Respondent is, in fact, the lawful successor to Mallery under *Burns*, its refusals to bargain with the Union violated Section 8(a)(5), as I further find and conclude.

CONCLUSIONS OF LAW

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- 1. By the following acts and conduct, the Respondent has violated Section 8(a)(1) of the Act:
- (a) Threatening its employees with closure of its Hancock, New York, sawmill if they did not seek the return of any collective-bargaining authorization cards that they may have signed for the Union.
 - (b) Threatening to make fewer investments in its sawmill because the employees had supported, or had failed to disavow, the Union.
 - (c) Ordering employees to disavow the Union.
 - (d) Offering telephone service or other assistance to employees in disavowing the Union.
- (e) Conducting surveillance of employees as they communicated with representatives of the Union. 35
 - 2. By failing and refusing to bargain with the Union, the Respondent has violated Section 8(a)(5) of the Act.
 - 3. The Respondent has not otherwise violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁵

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ORDER

The Respondent, Hancock Lumber, LLC, of Hancock, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

³⁴ See *Albert Einstein Medical Center*, 316 NLRB 1040 (1995)(such denigration of the Union violates Section 8(a)(1) because it is notice to the employees that their collective bargaining efforts will be futile).
³⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions

and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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- (a) Threatening its employees with closure of its Hancock, New York, sawmill if they did not seek the return of any collective-bargaining authorization cards that they may have signed for the Union.
- (b) Threatening to make fewer investments in its sawmill because the employees had supported, or because they had failed to disavow, the Union.
 - (c) Ordering employees to disavow the Union.
 - (d) Offering telephone service or other assistance to employees in disavowing the Union.
 - (e) Conducting surveillance of employees as they communicate with representatives of the Union.
- (f) Failing and refusing to bargain with United Brotherhood of Carpenters and Joiners of America, Empire State Regional Council of Carpenters, Local 42, as the exclusive collective-bargaining representative of the employees in the following unit, which unit is appropriate for collective bargaining:
- All full-time and regular part-time production and maintenance employees employed by the Respondent at its Hancock, New York facility; excluding truck drivers, office clerical employees, guards and all professional employees and supervisors as defined in the Act.
- (g) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Upon request, bargain collectively and in good faith concerning rates of pay, hours of employment and other terms and conditions of employment with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit, and embody in a signed agreement any understanding that is reached.
- (b) Within 14 days after service by the Region, post at its Hancock, New York, facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 19, 2004, the approximate date of the first unfair labor practice found herein.

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³⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

JD-77-05

- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
- 5 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C.,

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David L. Evans Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closure of our Hancock, New York, sawmill if you do not seek the return of any collective-bargaining authorization cards that you may have signed for United Brotherhood of Carpenters and Joiners of America, Empire State Regional Council of Carpenters, Local 42 (the Union).

WE WILL NOT threaten to make fewer investments in our sawmill because you have supported, or have failed to disavow, the Union.

WE WILL NOT order you to disavow the Union.

WE WILL NOT offer to you telephone service or other assistance in disavowing the Union.

WE WILL NOT conduct surveillance of you as you communicate with representatives of the Union.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of the employees in the following unit, which unit is appropriate for collective bargaining:

All full-time and regular part-time production and maintenance employees employed by Hancock Lumber, LLC, at our Hancock, New York facility; excluding truck drivers, office clerical employees, guards and all professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Federal Law.

WE WILL recognize the Union as your collective-bargaining representative and upon request bargain with the Union regarding hours, wages, and other terms and conditions of employment.

HANCOCK LUMBER, LLC.
 (Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent of the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Room 901, Buffalo, New York 14202–2387, Telephone 716–551–4951.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.